In the

# United States Circuit Court of Appeals

For the Ninth Circuit

No. 7887

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellant and Cross-Appellee,

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,

Appellee and Cross-Appellant.

# Petition of Appellee for Rehearing


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FILED

# INDEX TO CITATIONS


PAGE

Baer Brothers Mercantile Co. v. Denver & Rio Grande Railroad Co., 233 U. S. 479, 34 S. C. R. 641 .......... 6

Belcher v. Tacoma & Eastern Railway Co., 117 Wash. 512, 201 Pac. 750 .......... 8, 15

Denney v. Pacific Tel. & Tel. Co., 276 U. S. 97, 48 S. Ct. 223 .......... 8

Lewis v. Monson, 151 U. S. 545, 14 S. Ct. 424 .......... 7

Northern Pac. Ry. Co. v. Sauk River Lumber Co., 160 Wash. 691, 295 Pac. 926 .......... 6

Pacific Coast Elevator Co. v. Department of Public Works, 130 Wash. 620, 228 Pac. 1022 .......... 7

Pacific Tel. & Tel. Co. v. Whitcomb, 12 Fed. (2d) 279 .......... 8

Skagit County v. Puget Mill Co., 249 Fed. 965 .......... 7

State ex rel Great Northern Railway Co. v. Public Service Commission, 76 Wash. 625, 137 Pac. 132 .......... 10, 11

10 R. C. L. 702, Sec. 29 .......... 14

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# Petition of Appellee for Rehearing

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To the Honorable Judges of the above entitled court:

The appellee hereby petitions for a rehearing of this cause both on appeal and cross-appeal in this court, and submits the following in support of the application.

## I.

## SCHEDULE OF DATES

During 1926, logs hauled;

1926-1927, freight charges paid;

January 28, 1927, shipper's complaint filed with Department of Public Works;

July 1, 1929, findings of fact and order of Department rendered;

July 11, 1929, petition of carrier to Supreme Court of Thurston County for review of Departmental order;

February 17, 1930, order of said Superior Court reversing Department.

February 17, 1930, shipper's appeal to the Supreme Court of Washington;

February 18, 1931, decision of Supreme Court;

June 21, 1930, commencement of this action in Superior Court of Snohomish County;

July 7, 1930, order of removal to United States District Court;

March 5, 1935, judgment of District Court on verdict;

May 27, 1935, order allowing appeal to this court;

March 9, 1936, decision of this court.

During this nine year period of litigation, three decisions sustaining the shipper's claim have been made, to-wit: Departmental decision, decision of the Supreme Court of Washington, and verdict of the jury in this case and judgment of District Court rendered thereon. We do not claim that the unfortunate result of this nine year period of litigation changes the law or the application

thereof, but we do sincerely believe that the circumstances constitute a persuasive factor toward the application to the case of broad and liberal, rather than narrow and technical interpretation. It is our view that the latter type has been adopted by this court in its decision.

In the following there is submitted our contention that the decision is in error whether the spirit of liberality or that of technicality be applied.

## II.

## SCHEDULE OF EVENTS

From the findings of the Department, we quote the following, italicizing certain portions thereof *not* referred to in the opinion of this court.

> (P.T. 80) "The following table taken from those exhibits sets forth information pertinent to its contention and shows the 'cut off' periods during which inventories and check figures were made:

**RAILWAY COMPANY'S SCALE**

| Period | No. of Logs | Railroad Scale (feet) | Footage added to make minimum of 6,000 ft. per car | Total footage charged for (feet) | Freight Charges Paid |
|---|---|---|---|---|---|
| 12/31/25 to 6/30/26 inc. | 47,866 | 45,097,170 | 495,330 | 45,592,500 | $113,968.95 |
| 7/1/26 to 12/31/26 inc. | 31,066 | 29,424,400 | 501,110 | 29,925,510 | 74,815.60 |
| Total | 78,932 | 74,521,570 | 996,440 | 75,518,010 | $188,784.55 |

## BUREAU SCALE AND RESULTS THEREFROM

| Period | No. of Logs | Board Measure Scale (feet) | No. of feet upon which frt. chgs. should be based incl. minimum | Freight Charges should be | Amount of over charge |
|---|---|---|---|---|---|
| 12/31/25 to 6/30/26 inc. | 48,872 | 42,736,230 | 43,464,320 | $108,668.61 | $5,300.34 |
| 7/1/26 to 12/31/26 inc. | 31,332 | 27,590,050 | 28,330,670 | 70,833.31 | 3,982.29 |
| Total | 80,204 | 70,326,280 | 71,794,990 | $179.501.92 | $9,282.63 |

"Thus it is shown that during the entire period covered by the complaint the railway company's scale of all logs carried for the logging company amounted to 74,521,570 feet to which are added 996,440 feet as a penalty on carloads not loaded to the required railway company's schedule minimum of 6.000 feet per car, a total of 75,518,010 feet; freight charges $188,784.55. Those figures were computed from the paid freight bills of the railway company offered as Exhibit No. 3 in this proceeding. The bureau's scale on the identical logs computed to and from the cut-off periods supra, shows the actual board measure scale with deductions was 70,326,280 feet. Making due allowance for cars not loaded to the minimum of 6,000 feet each, it increased the footage to 71,794,990 upon which the transportation charges, at $2.50 per thousand feet, should have been $179,501.92. Thus the overcharge would be $9,282.63 as alleged by the logging company."

(P.T. 92) *"We are further of the opinion and find that all shipments of logs herein referred to, made by the complainant between the dates shown, were properly and correctly scaled by the bureau in accordance with the methods described above.*

*"We are further of the opinion and find that the charges collected were unreasonable to the extent that they exceeded $179,501.92.*

*"We further find that complainant made the shipments as described at the charges herein found unreasonable, that it paid and bore the charges thereon, that it has been damaged thereby in the amount of the differences between the charges paid and those which would have accrued at the charges herein found reasonable; and that it is entitled to reparation and interest."*

Of the findings the opinion says:

"This, obviously, is a mere statement of plaintiff's contention. It is not a finding of any fact. Instead of showing a determination by the Department of the amount of the alleged overcharge, the complaint shows on its face that there has been no such determination."

While we concede that the findings lack the formality customarily adopted by courts in making findings of fact, nevertheless we submit that the following findings of fact were clearly made by the Department, to-wit:

The freight charges amounted to $188,789.00, (P.T. 80). (This is undisputed and admitted throughout.)

The transportation charges should have been $179,-501.92, (P.T. 81).

The overcharge was $9,282.63, (P.T. 81).

The Bureau's scale was correct, (71,794,990 feet), (P.T. 81 and 92).

The carrier's charges ($188,784.55) were unreasonable to the extent that they exceeded $179,501.92, (P.T. 80 and 92).

The difference between $188,784.55 and $179,501.92 is $9,282.63, (P.T. 80, 81 and 92).

So it seems to us entirely clear, whether the rule of interpretation applied be liberal or technical, that the Department found an overcharge in the exact amount sued for.

The decisions of the Supreme Court of Washington (160 Wash. 691, 295 Pac. 926, P. T. 46) found the following facts, (160 Wash. 693, P. T. 47):

> "During the year 1926 the logging company shipped logs for which it paid the railroad company freight in the sum of $188,784.55. Believing that it had been overcharged, it filed an application with the department of public works for a refund. Upon the hearing, the department found that all payments in excess of $179,501.92 were excessive, making the overcharge $9,282.63."

and at page 696, (P.T. 52):—

> "As to the amount of recovery, this is based upon the calculations of a rate and traffic expert and it appears to us to be substantially accurate."

As the Supreme Court said, (p. 695, P.T. 51):

> "It must be remembered that this is a proceeding to recover for an overcharge, and not a rate-making proceeding."

The Supreme Court of the United States, in *Baer Brothers Mercantile Co. v. Denver & Rio Grande Railroad* Co., 233 U. S. 479, 34 S. C. R. 641, pronounced the law as follows:

> "But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity, to prevent further injury to the public."

This principle is applied to the Washington Act (by quotation)—*Pacific Coast Elevator Co. v. Department of Public Works*, 130 Wash. 620, at 639. 228 Pac. 1022.

Whether or not the findings of the Department are definite, certainly the findings of the Supreme Court are definite and certain.

A decision of the highest court of the state upon a state statute is binding upon the Federal Courts. When that decision involves the identical matter which comes before the Federal Courts, the state decision is not only binding on points of law but is *stare decisis* on the facts. This doctrine is not limited to state decisions interpreting statutes. It goes further and covers the state court's interpretation of a state statute as bearing upon an order of a subordinate state tribunal.

In *Skagit County v. Puget Mill Co.,* (C. C. A. 9th), 249 Fed. 965, the Supreme Court of the State in construing a state statute had held that a certain notice must be given to the taxpayer. In the cited case it was urged that the decision of the Supreme Court should be regarded as *obiter dictum.* This court held otherwise, saying:

> "But as the court deliberately considered and construed the clause of the statute which relates to a notice fixing a date certain for the appearance of the property owner, we abide by the construction given."

The court cited the case of *Lewis v. Monson,* 151 U. S. 545, 14 S. Ct. 424, in which the language of court is:

> "The determination of any questions affecting them (referring to state statutes) is a matter primarily belonging to the courts of the state, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the federal constitution has been invaded."

*Belcher v. Tacoma & Eastern Railway Co.,* 117 Wash. 512, 201 Pac. 750, involved an action brought by the shipper against the carrier. It seems that there had been three previous decisions of the Supreme Court of Washington upon the dispute between the parties. The opinion refers to them and says:

> "We take it that the law of this case has been established by these prior decisions and it would be acarpous to again review the many intricate questions involved."

In *Pacific Tel. & Tel. Co. v. Whitcomb,* 12 fed. (2d) 279, it was contended by the public service corporation that an order of the Washington State Department in fixing new rates did not terminate the old rates. The opinion (of three judges) refers to a previous decision of the Supreme Court of Washington holding that the order of the Department of Public Works in question was just as effective as if there had been an express provision terminating existing rates and holding that to be the legal effect of the order and that the form or language used is not very material. The court considered the Washington decision aforesaid and said of it:

> "This holding is the construction of a state statute by the court of last resort of the state, and consequently is binding upon this court."

We understand this to be a clear holding that a decision of the Supreme Court of the state as to the interpretation of an order of the Department made under a state statute is the construction of a state statute, and consequently binding upon the federal courts.

The case last cited was carried to the Supreme Court of the United States and is reported in 276 U. S., p. 97, 48 S. Ct. 223, in which the proposition here under consideration was stated in the following language:

> "The powers and duties of the Department of Public Works and the effect of its orders must be ascertained upon a consideration of the local Constitution and statutes, and the construction placed upon them by the state courts."

If the above quoted findings of the State Supreme Court were made in the exercise of its judicial or quasi-judicial jurisdiction, the point is as clear as day, i.e. that its decision is *stare decisis.* If, however, it should be assumed that the findings were made by the Supreme Court under its quasi-legislative jurisidiction, they were made in the exercise of its appellate jurisdiction. In rendering its decision it surely had to interpret the findings and order of the Department. In other words, in determining whether the findings and order of the Department should be affirmed or reversed, it had to *first understand, interpret and pass upon the findings and order.* In so doing (as the before quoted language of the opinion clearly shows), it interpreted the findings and order, and adjudicated that the Department found as facts:

1. That the total charge was $188,784.55;

2. That it should have been $179,501.92; and,

3. That the overcharge was $9,282.63.

Therefore, it is evident that this court has erred in holding that sufficient foundation had not been laid to authorize the commencement of this action in the Superior Court of Snohomish County, and the maintaining the same in the District Court.

We are not overlooking the fact that the Department, after finding specifically the amount of the overcharge, followed the said specific findings by an order as follows:

> (P. T. 92) "IT IS ORDERED, That the above named respondent be, and it hereby is, notified to pay

to the Department of Public Works in accordance with Chapter 110, Laws of 1921 (Rem. Comp. Stat. 10436) as reparation all sums in excess of the sum of $179,501.92 paid by complainant to respondent on logs shipped from Darrington to Everett between December 31, 1925, and January 1, 1927, together with interest from date of collection.''

''The parties hereto are directed to ascertain from the records the exact amount of reparation due under this order and to communicate the same to the Department. Jurisdiction is hereby reserved by the Department to enter a further order, requiring the payment of reparation by respondent to complainant in the sum agreed upon by the parties, or, if the parties are unable to agree then in such sum as the Department may find is in fact due; and to make such other and further orders as are necessary in the premises.''

Now the last paragraph of the order may have been intended to leave it open for the parties to compromise upon a smaller amount in order to avoid further litigation of the subject matter, but it is respectfully submitted that this unnecessary language does not detract from the fact that the Department found an overcharge in a certain fixed sum and ordered the payment of that amount by the carrier.

However intended, the first paragraph of the order is a definite and certain direction for the payment of a certain, fixed sum (especially in view of the specific findings preceding and expressly made a part of the order). Certainly, it is the first paragraph which is controlling and not, as the opinion assumes, the second. If not so, the most to be said against the order is that it is somewhat ambiguous.

Pertinent at this point is the decision in *State ex rel Great Northern Railway Co. v. Public Service Com-*

*mission,* 76 Wash. 625, 137 Pac. 132, wherein the order (made November 18, 1911) directed that joint rates be put in force, but further provided that the railway companies were given ten days to comply with the terms of the order, the court at page 628 thus describing the order:

> "It being further provided that in case of their failure so to agree, the Public Service Commission would itself, by a supplemental order, establish such rates and fix the division between the respective carriers."

The opinion holds that this order was subject to review by the state courts under the statute and in the course of the opinion the court says (p. 629):

> "At all events, the order of November 18th was a final order to all intents and purposes. It fully covered and disposed of the matter before the Commission. It required nothing to make it effectual, and, had it been complied with by appellants (the railroad companies) would have ended the matter. That it did not end the matter was not because of its lack of finality, but because appellants, having failed to observe its mandate, subsequent action to enforce it became necessary on the part of the Commission."

## III.

## SUBSEQUENT DEVELOPMENTS

The subsequent history of the matter is such as to clearly preclude the carrier from claiming that the findings and order did not constitute a sufficient basis for the commencement of the action in Snohomish County.

It seems to us that the findings and order fixed the amount of the overcharge and directed its payment, and the paragraph of the order last quoted, properly con-

sidered, did not detract from the force of the court's finding of fact and order of payment. No more could be said against it than that it rendered the intent ambiguous. If so, it is familiar law that the construction placed upon the order by the parties affected thereby is of supreme importance in the interpretation of the order.

The first step thereafter taken by the carrier was to file (ten days later) a petition to the Superior Court of Thurston County to review the Departmental order. Why was such petition filed, unless the carrier regarded the finding and order of the Department as complete and final? Was its purpose that if the courts (Superior and Supreme) should affirm the Departmental order thereupon the Department would enter another order saying in substance that the carrier is ordered to pay the $9,282.63, and thereupon the carrier would seek a review of this latter order and carry that through the state courts so that in the meantime the shipper would have no right to sue in one of the Superior Courts to recover the $9,282.63? Such purpose on the part of the carrier is inconceivable in fact, but at any rate would be untenable in a court.

The carrier's next step was to remove the case from the Snohomish County court to the United States District Court, interposing (P. T. 62) a motion to dismiss on the ground that it appears from the complaint that the plaintiff has no cause of action. This motion was not pressed, and it seems not to have been passed upon. In its petition for removal (P. T. 9), it alleged that "this action is to recover on an interlocutory order made by the Department of Public Works on July 1, 1929, that petitioner pay to the Department of Public Works the sum of $9,282.63 on account of reparation for alleged overcharges on shipments of logs made by the plaintiff, Sauk River

Lumber Co., on the railroad of defendant.'' Then the plaintiff interposed a motion to remand, and the carrier opposed it, obtaining from Judge Neterer an order (P. T. 13) denying the petition, Judge Neterer rendering a decision in which he held that the jurisdiction of the Department and the state courts had been exhausted, and an independent judicial right created, predicted upon the findings which are presumptively right.

The carrier's next step was to interpose its answer in which it expressly admitted (P. T. 23, 24), that the amount of its charges was the sum of $188,784.55, and that (P. T. 24) the Department made the findings and order, copy of which is attached to the complaint. In the answer (P. T. 32) it is affirmatively alleged that the freight charges collected were $188,784.55. On the same page it impliedly admits the amount of the difference between the actual and the proper freight charge, to-wit, $9,282.63.

Its next step was to file an amendment (Paragraph XIV) to the answer (P. T. 66), charging that the hearing, findings of fact, and order of the Department, are void for the reason that the Department was acting in a judicial capacity and had an interest in the outcome.

> ''That the Department did, in said hearing and order, purport to adjudge unto itself 10% of its award, or the sum of $928.26.''

As the case was approaching trial in the District Court, the carrier made a motion for dismissal (P. T. 62), in which, for the first time, it advanced the claim that the Department's order was not final because the parties had not yet ascertained the exact amount of reparation. Therefore, the carrier's theory in the motion is (as we understand it) that the jurisdiction of the Department has not been exhausted, (contrary to Judge Neterer's

decision, P. T. 15, 16), and therefore recourse to the courts was premature. This motion was denied by Judge Bowen, (P. T. 64). During the trial, the carrier interposed an oral motion to dismiss (P. T. 73) based upon the alleged absence of jurisdiction, the ground asserted being that the "order of reparation here involved" was void because the Department was disqualified (on account of the 10%), the carrier stating that the motion was predicated upon the matters alleged in the fourteenth paragraph of the Answer. See P. T. 66 wherein the fourteenth paragraph is set forth. It has been hereinbefore discussed. In this connection it is worthy of remark that if the Departmental order was not final, the 10% point would be premature.

It is respectfully submitted that this course of conduct on the part of the carrier is such as to preclude it from advancing in either the District or to this court any claim that the Departmental order was not sufficient to support this action.

It may be laid down as a general rule that a party will not be allowed in a subsequent judicial proceeding to take a position in conflict with the position taken by him in a former judicial proceeding, where the latter position is to the prejudice of the adverse party, and the parties and questions involved are the same.

10 R. C. L. 702, Sec. 29.

The carrier sought and had a review of the departmental order on the theory that the department made a finding of the amount of the overcharge and an order for its payment. That certiorari proceeding having come to an end by the decision of the Supreme Court, the carrier is not permitted in this later action to take a contradictory position.

In passing, the atention of the court is called to the fact that in the amended reply (P. T. 60), the point is made that the carrier could have presented to the Superior and Supreme Courts the defenses interposed in the District Court, and having a choice of two remedies it elected to assert its defenses before the Superior Court of Thurston County and the Supreme Court of the state.

## IV.

## CONCLUSION

If the present ruling of the court is to stand, the only procedure open to the shipper is to apply to the Department for a further order. It follows that the court's said ruling is in effect an order of dismissal. Therefore this court should by a further opinion or by explicit language in the mandate see to it that the dismissal will be without prejudice to the shipper's right to apply for such further order and then to commence action in a proper Superior Court to collect the sum due. Such would be in accord with precedent. See *Belcher v. Tacoma & Eastern Railway Co.,* 99 Wash. 34, at 46, 201 Pac. 750.

Respectfully submitted,

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